Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 81-742

In the Matter of

Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process

FIRST REPORT AND ORDER

Adopted: March 30, 1989; Released: May 16, 1989

By the Commission: Commissioner Dennis concurring in part and dissenting in part and issuing a statement.

I. INTRODUCTION

1. This *Report and Order* constitutes the Commission's first action in resolving a lengthy comprehensive inquiry, begun in 1981,[1] to obtain public comment on methods of improving the broadcast renewal process. It addresses two of five broad issues raised for comment in our *Second Further Notice of Inquiry*, the most recent action in this docket.[2]

2. First, in response to troubling allegations that some parties might be using the renewal process to obtain payments or benefits from the renewal applicant unrelated to any legitimate public interest aims, we invited public comment on this alleged abuse of the comparative renewal process.[3] Specifically, we asked whether competing applications and petitions to deny were filed against license renewal applicants to exact large settlement payments for dismissing these challenges, and whether limitations on settlement payments would help curb such abuse. In line with virtually unanimous support from the commenters for limitations on settlement payments, we are: (1) banning all payments that can be made to competing applicants, other than to the incumbent licensee, in exchange for withdrawing an application prior to the Initial Decision stage of the comparative hearing, and thereafter, limiting payments to the legitimate and prudent expenses of the withdrawing applicant; (2) limiting payments that can be made in exchange for withdrawing petitions to deny to the legitimate and prudent expenses of the withdrawing petitioner; and (3) reviewing citizens' agreements reached in exchange for withdrawing petitions to deny on a case-by-case basis. These measures should effectively remove the economic incentive present in the renewal system to file competing applications and petitions to deny for the principal purpose of extorting settlements in exchange for dismissing these challenges.

3. Second, we sought comment on whether we should eliminate the *Cameron* doctrine, a policy that allows competing applicants in a comparative renewal proceeding to presume that they could acquire the incumbent licensee's transmitter site if they prevail. This presumption generally permits applicants to avoid submitting an independent engineering proposal with their application. Consistent with the comments, the Commission is eliminating this policy, and requiring competing applicants to provide reasonable assurance of site availability.

4. The Commission also sought comment on other proposed reforms of our license renewal process which will be resolved separately. First, we sought comment on whether we should modify FCC Form 301 to require competing applicants in a license renewal context to submit additional information as another means of deterring non *bona fide* applicants. We also sought comment on similar proposed amendments to Form 301 in General Docket No. 88-328, which applies more broadly to all applications for construction permits, including applications that are mutually exclusive with license renewal applications. We are incorporating by reference the comments and reply comments submitted in this proceeding on proposed Form 301 amendments into General Docket No. 88-328. In a *Report and Order* adopted concurrently with this *Report and Order*, we are amending Form 301 to require all applicants to provide more financial, ownership and integration information.[4] In so doing, we expect, among other things, to discourage financially unqualified, sham and abusive applicants from filing competing applications in the license renewal context, and to provide the means to identify such persons who do file.

5. Another potential incentive for abuse of the FCC's license renewal process are the unclear standards currently used in a comparative hearing to determine whether an incumbent licensee or a competing applicant will best serve the public interest, convenience and necessity. Because the Commission believed that meaningful reformation of the license renewal process could only be accomplished by striking at all incentives for abuse, including uncertain license renewal standards, we sought comment on proposals to reform these renewal standards. Specifically, the Commission sought comment on proposals to clarify its standards for awarding a so-called "renewal expectancy," a credit awarded to incumbent licensees for "meritorious" service that meets the needs and interests of its community of license; and proposals to eliminate, or reduce in weight, certain of the criteria used to compare incumbent licensees and competing applicants in a renewal proceeding. For reasons stated in a separate *Third Further Notice of Inquiry*,[5] the Commission is seeking comment on an additional proposal for making the Commission's renewal expectancy standard more concrete and less subject to protracted litigation and abuse. Those portions of this proceeding pertaining to the renewal expectancy standard, as well as the other comparative criteria, will be held open pending further comment.

6. A key purpose of this inquiry was to reduce abuse of our license renewal process by correcting the underlying opportunity for abuse (uncertainty in our renewal standards), the incentive for abuse (the potential for large settlement payoffs), as well as the mechanisms for abuse (streamlined filing requirements that have had the unintentional effect of making it easier for non *bona fide* applicants to file competing applications). This *Report and*

Order, along with our *Form 301 Report and Order*, constitute the first significant steps toward eliminating abuse of our license renewal process.

II. PAYMENT LIMITATIONS

A. *Background*

7. In 1987, we initiated MM Docket No. 87-314 to look at abuses of Commission processes generally.[6] In our *Second Further Notice* in this proceeding we incorporated all abuse issues raised in MM Docket No. 87-314 directed or otherwise related to the comparative renewal process.[7] The major types of abuse, which are the focus of this proceeding, are the use of competing applications, petitions to deny or citizens' agreements to extract money or other consideration from incumbent licensees or other mutually exclusive applicants, rather than to further the Commission's public interest goals.

8. Under our rules, any person may file an application for construction of a station that is mutually exclusive with an application for license renewal.[8] Such applications generally necessitate a comparative hearing to determine whether grant of the license to the incumbent or the challenger best serves the public interest.[9] Settlements among mutually exclusive applicants in the comparative renewal context are governed by Section 311(d) of the Communications Act. The statute makes it unlawful for a competing applicant to agree to withdraw an application "in exchange for the payment of money, or the transfer of assets or any other thing of value" by any other applicant "without approval of the Commission."[10] The statute further provides that:

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.[11]

9. The right to file a petition to deny is provided by Section 309(d) of the Communications Act.[12] A petition to deny is the process by which any person may challenge, among other things, an incumbent's license renewal on the grounds that the licensee lacks qualifications or that grant of the application would otherwise be inconsistent with the public interest.[13] It enables interested parties to provide information to help the Commission to determine whether grant of the application is in the public interest.[14] Unlike competing applications, there is no specific statutory provision that governs settlements of petitions to deny.

10. A citizens' agreement is a formal, written agreement between a citizens' group (*e.g.*, civic association, listeners' group, consumer organization, church group or minority or civil rights protective organization) and a broadcast licensee which usually addresses some aspect of a station's programming or employment practices. Citizens' agreements can be reached in numerous contexts. Those pertinent to our discussion here are reached in exchange for the withdrawal of a petition to deny. Under our current policy, we examine citizens' agreements which are incorporated in applications to the Commission or which are presented in a complaint or a formal request for review. We review them to ensure that they do not improperly impinge upon the licensee's nondelegable discretion and otherwise comply with applicable rules. In addition, we regard proposals of future performance, that are relevant to our decision making process, as representations to the Commission.[15]

11. Since 1982, we have not imposed any general limits on the amount of money or other consideration competing applicants or petitioners can receive in exchange for dismissing a renewal challenge.[16] Furthermore, as a part of our regulatory reforms, we significantly reduced the filing requirements for competing applicants.[17] We are concerned that these reforms have had the unintended result of encouraging the filing of non *bona fide* applications and petitions to extort settlements rather than for the intended goals of obtaining a license or identifying deficiences of incumbent licensees.

12. We solicited comment on a number of issues related to this potential abuse: (1) whether the public interest warranted reestablishing our policy of limiting payments made in settling competing applications and petitions to deny, including settlements in the form of citizens' agreements; (2) whether limits on settlements of competing applications are consistent with Section 311(d); and (3) whether the Commission should modify its current policy of treating programming promises in citizens' agreements as representations to the Commission.[18]

B. *Comments.*

13. Virtually all commenters who addressed these abuse issues, representing both industry and public interest groups, assert that abuse is a serious problem that warrants immediate Commission action. The clear majority of commenters support limitations on settlement payments for the dismissal of both competing applications and petitions to deny.

14. *Competing Applications.* Nineteen of the twenty-two comments which addressed the issue support limitations on settlements of competing applications.[19] Southeast Broadcasting Limited Partnership and Garden State Broadcasting Limited Partnership ("S.E. Broadcasting"), competing applicants in license renewal proceedings, filed the only comments that oppose monetary limits on settlement agreements on policy grounds. They assert that (1) the Commission is operating on a mere presumption that abuse of process actually exists; (2) the proposed limits would single out competing applicants in the renewal context (as opposed to applicants in the comparative new context) as presumptively dishonest without sufficient basis; and (3) the Commission has recognized settlements as a desirable means of resolving lengthy litigation and restoring normal broadcasting service.[20]

15. The majority of commenters that address the issue of whether the Commission has jurisdiction under section 311(d) of the Act to limit payments assert that Section 311(d) does not preclude the Commission from limiting the amount of consideration a competing applicant may receive in return for withdrawing its application.[21] In contrast, Southeast, along with The American Women in Radio and Television ("AWRT") and National Hispanic Media Coalition ("NHMC"), argue that the Commission lacks such authority.[22]

16. The commenters are fairly evenly split on the issue of what type of payment limitations should be imposed. CBS, Capital Cities/ABC, and the Office of Communica-

tion of the United Church of Christ, joined by six public interest groups ("UCC *et al.*"),[23] among others,[24] favor limiting payments to legitimate and prudent expenses for settlements of competing applications.[25] These parties assert that this limitation achieves the proper balance between encouraging responsible participation in comparative renewal challenges and discouraging those who use the process merely to extract settlements.[26] Commenters argue that a total ban on payments may deter legitimate challengers from reaching good faith settlements, unnecessarily extend renewal proceedings, waste Commission resources and keep a cloud over the license. They argue that allowing settlements for legitimate and prudent expenses will provide a way out of the process for applicants so they will not be irretrievably committed to all or nothing results.[27]

17. In contrast, the National Association of Broadcasters ("NAB"), Action for Children's Television ("ACT") in joint comments with the Media Access Project ("MAP") and Henry Geller and Donna Lampert ("Geller & Lampert") (hereinafter "ACT *et al.* "), and Leibowitz & Spencer on behalf of broadcasters and state broadcast associations,[28] among others,[29] assert that we should permit no financial or other consideration in exchange for dismissing a competing application in a comparative renewal proceeding. These parties assert that banning all payments is the only way to assure that competing applications are filed for the sole purpose of acquiring a broadcast license, rather than for private gain, harassment or speculation. They argue that permitting even legitimate and prudent expenses will not deter speculative filers because a challenger can still file a no-cost, no-risk application, whereas a complete ban will force speculators to consider a risk/benefit analysis before filing an application. Finally, they assert that a complete ban on settlement payments will not deter legitimate competing applicants because the incentive for filing -- a very valuable license -- is still there.[30]

18. The Capital Broadcasting Corporation, in joint comments with other broadcast licensees ("CBC *et al.* "), suggest a middle ground between the two proposals. They urge the Commission to adopt a "rebuttable presumption" that payments in exchange for the withdrawal of competing applications are contrary to the public interest. To overcome the presumption, parties to a settlement agreement would be required to explain why payment would be in the public interest. In no case, should the Commission approve payments in excess of legitimate and prudent expenses.[31] Other parties urge the Commission to adopt waiver provisions similar to CBC's rebuttable presumption. These include waiving the ban (or legitimate and prudent expense limit) if payment is "in the public interest,"[32] or "further[s] some important Commission rule or policy,"[33] or upon a showing of "unique and compelling circumstances."[34]

19. *Petitions to Deny.* As with competing applications, the majority of commenters advocate limiting payments for settlements of petitions to deny.[35] With a few exceptions, the commenters would impose the same types of limits on settlements of petitions to deny as on competing applications.[36] Capital Cities/ABC, ACT *et al.* and the NBMC, which support limits on settlements of competing applications, would impose no limits on settlements of petitions to deny. They argue that petitions to deny serve a particularly key monitoring and compliance role, and that the Commission would be undermining this public interest function if it imposed settlement limitations on petitions.[37] AWRT, which opposes limiting settlements of competing applications on legal grounds, favors limiting settlements of petitions to deny to legitimate and prudent expenses.[38]

20. *Citizens' Agreements.* Five parties specifically commented on citizens' agreements. NAB urges the Commission not to enforce citizens' agreements, asserting that they could be litigated in local courts without burdening Commission resources. The remaining parties urge the Commission to continue to enforce such agreements.[39] The UCC *et al.*, for example, assert that citizens' agreements are a "particularly valuable method for resolving issues raised by the petition to deny process," "promote communication among broadcasters and their listening audience," and provide standards against which a licensee's performance should be measured.[40] They further assert that the enforcement of citizens' agreements should not be abandoned to the courts because courts lack the expertise to determine whether the agreements are consistent with FCC policies and the evolving public interest standard.[41] CBC *et al.* would allow payments above expenses in connection with citizens' agreements in the form of "fair remuneration for services that clearly further a legitimate Commission goal, actually rendered by clearly legitimate enterprises only."[42]

C. *Discussion*

21. *Need for Limits.* Based upon a careful review of the record, as well as our own experience in administering the licensing process, we find that there is the clear potential for abuse of our license renewal process. Our current policies, taken together, provide, albeit unintentionally, the incentives and mechanisms for abuse of our license renewal process. First, as discussed in detail in our *Third Further Notice* adopted concurrent with this *Report and Order*, our standards for license renewal are uncertain and not easily applied. This uncertainty in our renewal process provides a significant opportunity or incentive for abuse. An incumbent licensee, faced with vague standards for obtaining a license renewal and a lengthy and expensive hearing process, is vulnerable to settlement demands of challengers, particularly when the incumbent has substantial capital or other investments tied up in a broadcast facility. Our current policy of generally approving settlement payments[43] seems to have created an additional incentive for parties, who may have no real interest in obtaining a broadcast license, to challenge a license renewal application. In addition, our efforts to streamline the application process in 1981 have had the unintended result of making it easier for unqualified and non *bonafide* persons to file competing applications.[44] Finally, our policy of permitting applicants to rely on an incumbent's transmitter site, which in turn allows them to piggy back on an incumbent's engineering proposal in their applications, also makes it easier for non *bona fide* persons to file applications. These gaps in critical information in the application also make it difficult for incumbents to evaluate the merits of the challenges.

22. Abuse of the renewal process hurts the public interest in several ways. Incumbent licensees are required to expend considerable amounts of money to defend against and pay off challengers, including those who are unfunded and have no real intention of owning or operating a station.[45] Moreover, the staff and management of the incumbent are forced to spend considerable funds as well

as time and effort opposing challenges to license renewals.[46] The expenditure of such resources that otherwise might have been devoted to programming and other services, to defend against an abusive challenge is inefficient and wasteful.[47] Non *bona fide* challenges may also discourage *bona fide* competing applicants,[48] and unnecessarily drain Commission resources. Accordingly, the Commission finds that the public interest would be better served if we amend our rules and modify our policies to reduce this potential for abuse. This *Report and Order* takes the first step to remove these incentives and mechanisms for abuse by imposing strict limitations on settlement payments that can be made in exchange for withdrawing license renewal challenges.

23. S.E. Broadcasting charges that the Commission has no proof that its process is being abused, or that renewal challengers as a class (as opposed to new applicants) are likely to engage in improper conduct.[49] In our *Abuse of Process Notice* as well as our *Second Further Notice* herein, we asked commenters whether our preliminary concerns over possible abuses were warranted. Commenters, including a large number of broadcasters, virtually unanimously agree that there is widespread abuse of our process. Numerous commenters provide examples of alleged abuse. For example, Metroplex states that an abusive renewal challenge to station WHYI has forced it to devote hundreds of hours of management time to retain its license.[50] Great American alleges that a competing application was filed by an advertising agency against a station of its predecessor company not to obtain a license, but to force it to resolve a dispute with the agency regarding payment for advertising. Great American contends that its predecessor company was forced to settle because the license renewal challenge aborted a previously negotiated agreement for the sale of the station, and prevented the licensee from pursuing plans to sell the station.[51]

24. A study conducted by the NAB attempting to quantify abuse in the license transfer and renewal context[52] generated numerous additional examples of reported abuse. Respondents to the survey variously reported, for example, that they have been threatened with license renewal challenges unless they contributed to the challenger's organization, that they regularly contribute to certain groups to avoid license renewal challenges, and that they have been subjected to costly competing applications by disgruntled former employees.[53] Finally, concern about abuse in license renewal proceedings is also reflected in industry and other publications.[54] Accordingly, based on all the materials before us and our own experience, we believe our action to eliminate the mechanisms and incentives for abuse is warranted.

25. *Competing Applications.* As we noted above, the parties are divided in their views on whether we should impose a complete ban or a legitimate and prudent expense limitation on settlement payments. We have carefully evaluated the comments supporting both proposals, as well as the rebuttable presumption and waiver options, and weighed all these options against the *status quo*. For the reasons discussed below, we are adopting a policy prohibiting all payments to competing applicants (other than the incumbent licensee) for the withdrawal of an application prior to the Initial Decision stage of a comparative hearing.[55] Thereafter, we will approve settlements that do not exceed the withdrawing party's legitimate and prudent expenses for filing and litigating the competing application.

26. We believe this approach furthers a number of important policies. By prohibiting all payments in excess of legitimate and prudent expenses made anytime during a comparative hearing, we are eliminating most of the potential profit to applicants in filing competing applications. This should virtually eliminate those applicants whose purpose in filing is to settle out for profit and generally assure that applications are being filed solely for their intended purpose -- that of acquiring a broadcast license. By banning all settlement payments through the Initial Decision stage, we are further reducing the potential for abuse. First, we are increasing the likelihood that only serious, *bona fide* applicants will have the opportunity to settle out their competing applications. It is time consuming and expensive to litigate an application through the Initial Decision stage.[56] Moreover, an applicant that makes it through the Initial Decision stage has demonstrated that it is willing to develop a complete record on all pertinent hearing issues including technical issues, standard comparative issues and any basic qualifications issues designated (*i.e.*, those bearing on character, misrepresentation, and financial qualifications). For these reasons, we believe that an applicant's prosecution of its application through the Initial Decision stage is a persuasive indication of the *bona fides* of the application. Thus, restricting settlements to the post-Initial Decision stage helps ensure that settlements will be among *bona fide* competing applicants and incumbents only.

27. Second, we are removing the opportunity that non *bona fide* applicants currently have to exert undue pressure on incumbents to settle early in a comparative proceeding. Now, settlements most often occur at the beginning of the comparative process, when an incumbent still faces a long, expensive license renewal process, experiences the disadvantages of having a cloud over its license during that process, and has little information with which to evaluate challengers' applications. Under these circumstances, even a non *bona fide* challenger has great leverage over an incumbent and the incumbent has tremendous economic incentives to settle. This situation is ripe for abuse.

28. After the Initial Decision, however, the potential for abuse is dramatically diminished. If the Initial Decision favors the incumbent,[57] the incumbent is under far less pressure to settle. The incumbent goes into the appeal process with a decision in its favor; the expense of litigating an appeal is generally a fraction of the cost of obtaining the Initial Decision; and the incumbent knows the merits and demerits of the challenger's application. For these same reasons, a challenger generally has less leverage to force a settlement and its leverage is more consistent with the relative merits of its application. For example, if the evidence presented during the hearing raises serious questions about the challenger's financial qualifications, the challenger has less leverage to negotiate a settlement than if it presented a strong comparative case with no disqualifying issues at the hearing. Under these circumstances, an incumbent is under less intense pressure to settle, and has the information needed to make an efficient economic decision. It can determine whether it is less costly (in terms of money, staff resources, reputation, and the possibility of losing an appeal) to settle or litigate through the appellate process. At the same time, the Commission can be more certain that any such decision to settle is being driven by traditional considerations, such

as the cost of the appeal to the incumbent and the strength of the competing applications, rather than by applications filed in abuse of our processes.

29. In banning settlement payments prior to the Initial Decision only, we carefully considered commenters' concerns that a total ban on settlements may deter responsible participation in license renewals. We believe these carefully drawn restrictions will accomplish our goal of removing the potential for abuse of our process without unnecessarily deterring *bona fide* competing applications. The primary incentive for filing a competing application -- a potentially valuable television or radio license -- remains in place. Applicants who are intent upon obtaining a valuable broadcast license will not be deterred by our elimination of the potential for profiting from the application. Nor should serious applicants be deterred by the fact that they cannot recover fees or expenses prior to the Initial Decision stage. A serious challenger files because it believes it has a reasonable chance of obtaining a license -- not because it has the opportunity for recovering fees and expenses prior to the hearing.

30. Moreover, by permitting recovery of legitimate and prudent expenses only after the Initial Decision stage, we are requiring challengers to fully evaluate the risks and benefits of their application before filing. If challengers know that they have the potential for recovering fees and costs only if they make it through the Initial Decision stage, and that their bargaining power depends on the strength of their case after it has been subjected to scrutiny at the hearing, they will be forced to evaluate the risks and benefits of their applications before filing. Forcing applicants to make such a cost benefit analysis before filing should encourage, not deter, responsible participation in the license renewal process.

31. To the extent our new policy weeds out weak applicants, we believe this is a desired result. Under our current policy, weak applicants who may have a very slim chance of prevailing can file no-risk, no-cost applications because they are virtually assured of recovering at least attorney's fees and costs for dismissing their applications. We believe our new policy will discourage these weak applicants, and thereby reduce the pool of non serious competing applicants and the cost of the hearing to the Commission and incumbents without unduly discouraging serious applicants.

32. Finally, our new policy is consistent with our belief that settlements, *where abuse of process is not a factor*, can be an efficient way to resolve comparative licensing proceedings, preserve funds for service to the public, and allow us to conserve our limited administrative resources. We agree with commenters that a complete ban on settlement payments may lock perfectly legitimate parties into a fight to the end, which may unnecessarily extend the renewal proceeding. Thus, we will continue to encourage settlements as a means to efficiently terminate license renewal proceedings, but only at a time and with restrictions that will minimize the potential for abuse.

33. Our restrictions on settlement payments do not apply where there is a settlement agreement among the incumbent and all of the competing applicants that results in the sale of the station to one of the applicants or where the incumbent dismisses its application. Our purpose in limiting settlement payments is to eliminate the potential for abuse by parties who enter the comparative process for reasons other than to acquire a broadcast license. An incumbent licensee who seeks to renew its license is not in this category of potential abusers. Accordingly, where an incumbent wishes to sell its station to a competing applicant, or dismiss its renewal application in exchange for payment, this does not constitute an abuse of our comparative process. Rather, it serves the public interest to permit an incumbent who, for whatever reason, decides it no longer wishes to operate a broadcast station, to transfer its license or otherwise dismiss its renewal application with no restrictions. Because an uninterested licensee may not have sufficient incentive to expend the resources necessary to provide quality service to the public, the public would be better served by allowing the incumbent to sell or otherwise defer to a qualified applicant who desires to own the station.

34. *Section 311 (d).* The *Second Further Notice* solicited comment on the question of whether and to what extent our ability to place restrictions on settlement payments to competing applicants in a comparative renewal situation is constrained by Section 311(d). At this stage, the issue is whether the particular approach we have chosen -- that is, banning pre-Initial Decision settlement payments and restricting payments thereafter to legitimate and prudent expenses -- is authorized by Section 311(d). Section 311(d) provides that the Commission shall approve a settlement agreement "only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." We find, in accordance with the majority of commenters, that nothing in this language denies the Commission the authority to establish reasonable parameters for when and under what circumstances the public interest would be served by disapproving these agreements. Indeed, the statutory language appears to be clear on its face.[58] As long as the Commission determines that "no party to the agreement filed its application for the purpose of reaching or carrying out such [an] agreement," the Commission has broad authority under Section 3ll(d) to decide whether settlement agreements should be approved or disapproved under the public interest, convenience, and necessity standard. The legislative history on the section is scant; the Conference Report only instructs us that the section was to prevent the filing of "frivolous" applications challenging renewal applicants by parties who offer to withdraw the renewal challenge in exchange for "a payment of money or a transfer of assets."[59]

35. Moreover, nothing in the statutory language or the legislative history suggests that Section 3ll(d) requires the Commission to proceed on an *ad hoc*, case-by-case basis to determine if certain types of settlements are consistent with the public interest or prohibits the Commission from using its rule making powers to make such public interest determinations.[60] It is well established that the Commission may, by rule making, define the public interest as that term is used in the Communications Act.[61] In short, Section 3ll(d) imposes no limitation on the Commission's authority to disapprove settlement agreements provided the Commission adheres to the broad public interest standard.[62] All we have done here is to make a generalized policy judgment, based on our experience and the record in this proceeding, that the public is disserved by any settlement payments from the incumbent to a challenger prior to the Initial Decision, and payments in excess of legitimate and prudent expenses thereafter.

36. We find unpersuasive the position of S.E. Broadcasting that the 1982 amendment of Section 311(c) in the following session of Congress and its legislative history are evidence that the earlier enactment of Section 311(d) was intended to freely permit settlements for consideration.[63] Section 311(c) adopted language identical to Section 311(d) to govern settlements among applicants for new licenses. Prior to the amendment, Section 311(c) had allowed the Commission to approve settlements entered into by competing applicants for new stations only when the Commission had determined that the amount of consideration was "not in excess of the aggregate amount . . . to have been legitimately and prudently expended . . . by such applicant in connection with preparing, filing, and advocating the granting of his application."[64] In explaining the amendment to Section 311(c), the conferees referred to Section 311(d). Specifically, they stated that Section 311(d) was amended to provide that "the Commission shall approve any agreement between applicants where one or more of the applicants agrees to withdraw its application in return for valuable consideration [if] the Commission first . . . determine[s] that the agreement is consistent with the public interest and that no party to the agreement filed its application for the purpose of entering such an agreement."[65] We do not read this passage as meaning that the Commission is compelled to accept settlement agreements regardless of the amount of the payments involved or that we are somehow prevented from placing reasonable restrictions on the timing and amount of such payments in the public interest. The conferees, by their statement, were merely paraphrasing the language in Section 311(d) itself, language that is consistent with our actions here. As emphasized earlier, however, in determining the congressional intent underlying the earlier legislation, we think it is more pertinent to refer to the actual statutory language.

37. Moreover, although Sections 311(c) and (d) contain identical language, the public interest calculus under the two subsections differs substantially. Consequently, settlement payments in a comparative new context may call for a different regulatory treatment than is appropriate in a renewal situation. In the case of new station applicants, there is the strong public interest goal in obtaining new broadcast service as quickly as possible. As long as two or more applicants are in the midst of a comparative hearing, no new service is being provided to the public. Moreover, in the case of two or more applicants for a new authorization, even though both parties may intend to build a station if awarded the license, it is likely that one of the parties may value the license more than the other party. In that situation, it is both efficient and equitable for the Commission to allow a settlement payment without specifying limits on the amount of such a settlement. These considerations are somewhat different in the renewal context. Inasmuch as a station continues to operate during the pendency of a comparative challenge, service to the public is generally not an issue. Consequently, limits on settlements in the renewal context should have no impact on continuity of service. Moreover, because challengers can purchase a station from an incumbent licensee, subject to Commission approval with respect to qualifications, the limits we are adopting on settlements do not prevent the assignment of a license to a qualified challenger if it values the license more highly than the incumbent. Thus, the different public interest considerations applicable in the comparative renewal context warrant limits on the timing and amount of settlements regardless of whether such restrictions are recommended in the comparative new area.

38. In retrospect, given our analysis here, we will no longer adhere to the reasoning in our 1982 decision in *Western Connecticut Broadcasting Co.*,[66] which abolished the so-called *NBC* doctrine. The *NBC* doctrine was established by the Commission to govern the treatment of settlement agreements in comparative renewal cases prior to the enactment of Section 311(d). The doctrine provided that the Commission would approve settlements in the renewal context only in unique and compelling circumstances and, even then, for no more than the legitimate and prudent expenses of the withdrawing party. In *Western Connecticut*, we eliminated that policy, stating that since settlements in the license renewal context would be "reviewed in accordance with relevant statutory provisions [*i.e.*, Section 311(d)]," there was no further need for the *NBC* doctrine. The Commission also noted that any detriment stemming from the settlement, such as the loss of a choice between applicants, was offset by the benefits attributable to the termination of the litigation. The Commission concluded that settlement agreements in comparative renewal cases should be examined in the same manner as in initial licensing proceedings. Now that we have reexamined these issues with the benefit of experience and the extensive record in this proceeding, we believe that our conclusions in *Western Connecticut* did not sufficiently consider other factors that bear on the settlement process, especially the potential for abuse in the comparative renewal context. Accordingly, we depart from our holding in *Western Connecticut* insofar as we adopt herein more restrictive policies for settlement agreements in comparative renewal cases than those that apply in the initial licensing context.

39. *Petitions to Deny.* A person has the statutory right to file a petition to deny to challenge an incumbent licensee's renewal application on the grounds that the licensee lacks qualifications or that the grant of renewal would be inconsistent with the public interest.[67] Petitions to deny in the comparative renewal context are often filed to achieve nonfinancial goals such as to require a licensee to cure a deficiency in its performance, to provide certain types of programming, to continue to consider issues of concern to its community of license, or to improve its employment record regarding minorities and women. Petitions to deny can be dismissed in exchange for the payment of money and/or for promises to implement some type of nonfinancial reform. Where a petition to deny is dismissed in exchange for an agreement by a licensee to implement nonfinancial reforms, such settlements are often referred to as citizens' agreements. Our policy with regard to settlements of petitions to deny depends on whether the petition is dismissed in exchange for money or for a nonfinancial promise.

40. Where a petition to deny is settled in exchange for money, we will allow such payments provided they do not exceed the petitioner's legitimate and prudent expenses in prosecuting its petition. We agree with Capital Cities/ABC, UCC *et al.*, ACT *et al.* and other commenters that we must not discourage the use of petitions to deny in order to further our public interest goals. Petitions to deny play a critical role in our current regulatory scheme.[68] Members of the public, through the use of petitions to deny, serve as private attorneys general in-

forming us of deficiences in the performance of licensees and helping us ensure that licensees serve the public interest.[69]

41. We believe that a legitimate and prudent expense limitation on settlement payments of petitions to deny strikes the appropriate balance between deterring abuse and not discouraging the filing of such petitions. By prohibiting payments in excess of legitimate and prudent expenses we are removing the profit motive for filing petitions to deny. This should help ensure that petitions are filed for legitimate public interest purposes. By permitting recovery of legitimate and prudent expenses, we are preserving the petition to deny process as a monitoring and regulatory tool. It is more likely that individuals or public interest groups will perform their function of informing us of licensee deficiencies if they can maintain hope of recovery of the expenses they incur. To preserve the private attorney general function of petitions to deny, we believe we should provide for the possibility that a petitioner can be made economically whole.

42. The difference in our policies between petitions to deny and competing applications is due to the different functions of the two types of challenges. The goal of a legitimate competing applicant is to obtain a broadcast license. Since this goal cannot be reached before a hearing and a decision by the ALJ (unless the incumbent drops out), prohibiting settlement payments prior to that time helps ensure that competing applicants file for the goal of obtaining an application. In contrast, the primary purpose of a legitimate petition is to achieve a nonfinancial reform, which can occur any time during a renewal proceeding. An incumbent can agree early in the license renewal process to reform its minority hiring practices, for example. Petitioners should be entitled to attorney's fees and costs at any time in the process that deficiencies which stimulated the petition are resolved. Moreover, different incentives apply to the two types of challenges. Competing applicants have the possibility of obtaining a valuable broadcast license as an incentive to file. It is unlikely that *bona fide* applicants would be deterred from this goal merely because, under our new policy, they cannot settle for fees and costs prior to the Initial Decision. Unlike competing applicants who stand to obtain a valuable broadcasting license, parties filing petitions to deny have no corresponding valid economic incentive in carrying out their private attorney general function. Consequently, any restrictions on a petitioner's ability to recover fees and costs may discourage the legitimate use of petitions to deny.

43. *Citizens' Agreements.* A citizens' agreement is a contract in which a petitioner to deny agrees to dismiss its petition in exchange for a promise by the licensee to implement a nonfinancial reform such as a programming or an employment initiative. There are two policy issues related to citizens' agreements before us. The first is whether any limitation should be placed on citizens' agreements reached in settlement of petitions to deny. The second is whether the Commission should continue its current policy of interpreting and enforcing programming components of these private contractual arrangements in accordance with its policy in *Agreements Between Broadcast Licensees and the Public.*[70]

44. Commission policy toward citizens' agreements is an outgrowth of our longstanding policy of encouraging "affirmative dialogue" between broadcast licensees and the residents of their service areas. Such agreements, when entered into in consideration of, or in conjunction with, the withdrawal of a petition to deny, are not, in principle, mechanisms for abuse. Indeed, they provide a vehicle for amicably resolving disputes. However, many of the same concerns regarding potential abuse that motivated our restrictions on money payments in exchange for the withdrawal of petitions to deny appear to be equally applicable to citizens' agreements.

45. Ostensibly "nonfinancial" citizens' agreements often involve financial expenditures by the licensee to implement the reforms promised to the petitioner. Those expenditures may inure to the financial benefit of the petitioner, directly or indirectly. Consequently, these "nonfinancial" agreements can create the potential for abuse. Concessions extracted from the licensee under these agreements can merely be disguised private payoffs for dismissing a license renewal challenge where the petitioner itself, or an affiliated person or entity, is paid to implement the reform.

46. In light of this potential for abuse, we will review all citizens' agreements reached in exchange for dismissing a petition to deny on a case by case basis to determine whether the agreement furthers the public interest. In making this determination, we will presume that any agreement with a petitioner that calls for the *petitioner*, or any person or organization related to the petitioner, to carry out, for a fee, any programming, employment or other "nonfinancial" initiative does not further the public interest and hence will likely be disapproved. As discussed above, this type of arrangement is particularly susceptible to abuse. In contrast, a licensee's agreement with a petitioner to make changes in operations or programming, either *by itself* or through *disinterested third parties* without further participation by the petitioner, will likely be approved.[71] For example, we will regard an agreement to increase minority employment by using, for a fee, the services of *petitioner* or any person or organization related to petitioner, as presumptively contrary to the public interest, and it will likely be disapproved. In contrast, we will regard an agreement to increase the pool of minority applicants for employment by contracting with a third party, completely independent from petitioner, as consistent with the public interest, and it will likely be approved.

47. We note, however, that our general presumption that citizens' agreements in which the petitioner is paid to perform the promised reform are contrary to the public interest can be rebutted by clear and convincing evidence that the arrangement is, in fact, consistent with the public interest. Thus, we would probably find, for example, that where the petitioner is the only entity available that can perform a given service, an agreement to pay petitioner for performing that service would be approved as being consistent with the public interest.

48. The second issue before us concerning citizens' agreements is whether the Commission should remain involved in interpreting and enforcing such agreements. These agreements generally are private contractual matters between a licensee and a citizens' group. Under our current policy, we examine citizens' agreements which are incorporated in applications to the Commission or presented in a complaint or formal request for review. We review them to determine whether they improperly delegate nondelegable licensee responsibilities,[72] improperly

impinge on a licensee's nondelegable discretion, or otherwise violate any applicable rules. We are making no change in this policy.

49. We have also become involved, however, in the interpretation and enforcement of agreements filed at the Commission. We have regarded promises of future performance as commitments to the agency, and we have relied upon these commitments in our decision making process. We intend, as we have in the past, to take commitments to the agency that are relevant to our decision making process seriously. However, matters that are not germane to our decision making process do not become subject to agency enforcement simply because they are included in an agreement that is filed with us. The principal area where this has present relevance concerns agreements touching on programming matters. Over the course of the last decade we have eliminated detailed programmming proposals from our processes, including our renewal application. For what we believe are good and valid reasons, we no longer apply a "promise versus performance" standard to renewal applications. Accordingly, unless an action taken by the Commission is specifically conditioned on licensee representations relating to programming matters, we do not intend to enforce private contractual agreements relating to programming.

50. Finally, we believe it important to emphasize once again that a private settlement through the withdrawal of an agreement or otherwise does not necessarily dispose of issues that have been raised. If a petition contains specific allegations of fact sufficient to raise a substantial and material question of fact as to whether the applicant is qualified, the Commission must address and resolve such a question regardless of any agreement among the parties.[73]

51. *Enforcement.* In order to aid with the enforcement of the policies articulated above, we are adopting the disclosure and certification requirements set forth below.

52. Should any applicant in a license renewal proceeding, except an incumbent, seek to dismiss an application pending before the Commission[74] prior to the Initial Decision, each party to the proceeding must submit to the Commission a copy of any written agreement related to the dismissal of the application. Each party must also submit an affidavit:

(1) certifying that it has not received or paid and it will not receive or pay any money or other consideration in connection with the dismissal;

(2) disclosing the terms of any oral agreements related to the dismissal; and

(3) certifying that its application was not filed for the purpose of reaching or carrying out an agreement with any other party.

53. Should any applicant in a license renewal proceeding, except an incumbent, enter into an agreement after the Initial Decision, to dismiss an application pending before the Commission in exchange for payment, all parties to the agreement must file a joint request for approval accompanied by a copy of the agreement and an affidavit from each party:

(1) certifying that it has not received or paid and it will not receive or pay any money in exchange for the dismissal of the application in excess of the legitimate and prudent expenses incurred by the applicant seeking dismissal;

(2) disclosing the exact amount of any money paid or promised to the applicant seeking dismissal;

(3) disclosing the terms of any oral agreement related to the dismissal; and

(4) certifying that its application was not filed for the purpose of reaching or carrying out an agreement with any other party.

Any party seeking reimbursement of expenses under the agreement must also submit an itemized accounting of its expenses incurred in preparing, filing, and prosecuting its application for which reimbursement is sought.

54. Each of these disclosure and certification requirements will enable the Commission to enforce the policies set out herein. These reporting requirements should disclose whether any applicant seeking to withdraw an application prior to the Initial Decision has received, or will receive, money in connection with the withdrawal and whether there are any written or oral understandings related to the dismissal that would undermine our restrictions. This is necessary to enforce our pre-Initial Decision ban on payment. These reporting requirements should also disclose whether any applicant seeking to withdraw an application after the Initial Decision has received, or will receive, any money in excess of legitimate and prudent expenses, whether there are any oral understandings related to the withdrawal that would undermine our restrictions, and the information needed to verify the expenses for which the applicant is seeking reimbursement. This is necessary to enforce our post-Initial Decision limitation on settlement payments to legitimate and prudent expenses. Finally, the last certification in each category is required under Section 3ll(d) of the Act.

55. Where a petitioner to deny seeks to dismiss a petition filed against a license renewal application or any competing applications, each party to the petition (the petitioner and the party or parties against whom petitions were filed) must submit a copy of any written agreement relating to the dismissal and an affidavit:

(l) certifying that it has not received or paid and it will not receive or pay any money in exchange for the dismissal of the petition to deny in excess of legitimate and prudent expenses incurred by the petitioner seeking dismissal;

(2) disclosing the exact nature and amount of any money or other consideration[75] paid or promised in connection with the dismissal of the petition to deny; and

(3) disclosing the terms of any oral agreement related to the dismissal of the petition to deny.

Any petitioner seeking reimbursement of expenses under the agreement must also submit an itemized accounting of its expenses incurred in preparing, filing, and prosecuting its petition for which reimbursement is sought.

56. These requirements should disclose whether petitioner has received, or will receive, any money in excess of legitimate and prudent expenses, whether petitioner has been promised any nonfinancial concessions, whether there is any oral agreement or understanding that would violate our restrictions on settlement payments or citizens' agreements, and the information needed to verify the expenses for which the petitioner is seeking reimbursement.

57. Finally, if a petitioner to deny seeks to dismiss a petition filed against a license renewal application or any competing application in exchange for a citizens' agreement all parties to any such agreement must jointly submit a copy of the agreement to the Commission for approval under our policies in ¶¶ 46-47.

58. To implement these requirements we are hereby amending our rules as outlined in Appendix B. We intend to enforce our policies and rules using the full panoply of penalties available against all persons who fail to comply. Accordingly, any licensee who fails to provide accurate documentation, information or certification as required by our amended rules will also be in violation of Sections 73.1015 and 73.3513(d) of our rules, will be subject to revocation of their license under Section 312, to fines under Section 502 and to forfeiture under Section 503(b) of the Communications Act, and to prosecution for misrepresentation of a material fact under 18 U.S.C. §1001. Competing applicants who fail to provide accurate documentation, information or certification as required by our amended rules will also be in violation of Sections 73.1015 and 73.3513(d) of our rules, will be subject to fines under Section 502 and to forfeiture under Section 503 of the Communications Act, and to prosecution for misrepresentation under 18 U.S.C. §1001. Finally, petitioners who fail to provide accurate certification as required by our amended rules will also be in violation of Section 1.16 and will be subject to prosecution for misrepresentation under 18 U.S.C. §1001.

59. *Effective Date.* The policies and rules adopted herein will become on June 28, 1989, subject to Office of Management and Budget ("OMB") approval pursuant to the Paperwork Reduction Act of 1980. With regard to competing applications, the new policies and rules will apply to all competing applications pending before the Commission as of the effective date of this *Report and Order*, except those applications that have been designated for a hearing as of the effective date ("post-designation" applications). Settlements of post-designation applications will be governed by the current policies and rules even if they are reached after the effective day of this *Report and Order*. Settlements of any pending competing applications submitted to the Commission for approval prior to the effective date of this *Report and Order* likewise will be governed by the current policies and rules.

60. With regard to petitions to deny, the new policies and rules will apply to all petitions to deny pending before the Commission as of the effective date of this *Report and Order*, subject to OMB approval, except those petitions in which one or more allegations raised in the petition has been designated for a hearing. Petitions to deny at a post-designation stage of processing will be governed by the current policies and rules even if they are settled after the effective date of this *Report and Order*. Settlements of any pending petitions to deny reached prior to the effective date of this *Report and Order* likewise will be governed by the current policies and rules. Accordingly, such settlements, including settlements in the form of citizens' agreements, need not be presented to the Commission for approval.

61. It is important to the public interest to implement these policy and rule changes as expeditiously and broadly as possible. We have identified potential abuse of our process as a serious problem that requires prompt attention. The need for action is intensified by the fact that we have already begun a new cycle of broadcast renewals after a hiatus created by the statutory lengthening of license terms. Precisely because we believe our new policies and rules will be a significant step toward eradicating abuse of our process, it serves the public interest to apply them to existing as well as prospective applicants and petitioners as quickly as possible.

62. We are not imposing these policy changes on post-designation applicants or petitioners to avoid possible hardship to these challengers. They have relied on prior Commission policies and rules to begin the hearing process which typically involves a considerable expenditure of money and time. Permitting these applicants and petitioners to be governed by our current rules will ensure that they are not prejudiced by our policy and rule changes. In contrast, pre-designation applicants have neither begun litigating in reliance upon previous policies nor have they typically spent significant amounts of time or money in advancing an application or petition. Thus, there is little likelihood that a change in policies and rules will cause them injury. In any event, the public interest benefits resulting from the immediate application of our new policies and rules outweigh any conceivable adverse affects on such challengers.[76] For similar reasons, we are not imposing these policy changes on applicants that have filed settlement agreements with the Commission prior to the effective date of this *Report and Order*.

III. CAMERON POLICY

63. *Background.* Under Commission policy, when an applicant proposes a site for its transmitting antenna in a construction application, it must have reasonable assurance that the site will be available to it.[77] In *George E. Cameron Jr. Communications*,[78] we stated we would presume that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding. Accordingly, under current policy, we do not consider as an issue in a comparative hearing an incumbent's assertion that it will deny competing applicants use of its transmitter if its application is denied. We established this conclusive presumption to prevent an incumbent from representing that its site is not available merely to create a potentially disqualifying issue against its challengers. We believed this solution would, among other things, eliminate time-consuming inquiries into the site availability question.

64. In our *Second Further Notice*, however, we expressed the view that the *Cameron* presumption, in conjunction with other relaxed filing requirements, could also facilitate the filing of non *bona fide* competing applications. Specifically, we stated our concern that the presumption permits renewal challengers merely to clone technical proposals submitted by renewal applicants, rather than submit independent technical qualifications, thereby making it substantially easier and less expensive for applicants to file. Accordingly, we requested comment on eliminating or relaxing the *Cameron* presumption.

65. *Comments.* All commenters who addressed the issue advocate elimination of the *Cameron* presumption.[79] Generally, commenters argue that the presumption facilitates the filing of sham applications by permitting non *bona fide* challengers to merely clone an incumbent's engineering proposal. They further assert that an independent technical showing is a critical basis for comparing competing applicants and it is not unreasonable to require a challenger to make such a showing. Without it, they argue, there is no assurance that a prevailing challenger could acquire a site without interruption of service to the public.

66. *Discussion.* We find, based upon the comments and our experience with the *Cameron* presumption, that continued retention of the presumption would not serve the public interest and it should therefore be eliminated. By permitting renewal challengers to assume availability of the incumbent's transmitter site and thereby to simply copy the incumbent's engineering proposal, we are making it possible for non *bona fide* challengers to avoid comparison based on their own engineering qualifications and technical proposals. We do not now require a competing applicant to locate a site, obtain reasonable assurance that the site will be available, or make an independent showing of its technical qualifications. As a result, the absence of such requirements, involving some up front costs in terms of time and money, makes it more economically attractive for bogus challengers to file merely to elicit a settlement. To require a competing applicant to locate an available site and develop its own technical proposal may, in conjunction with our other strengthened filing requirements, help to deter sham applicants and permit a more complete comparison.

67. Moreover, we believe that such a requirement is reasonable and will improve the comparative process. In many instances, an incumbent licensee does not own a transmitter site but rather leases it from an independent third party. It is not unreasonable to require a challenger to make contingent arrangements with the site owner to lease the site should its application be granted. If an incumbent owns a transmitter site and represents that the site is not available, it is not unreasonable in most circumstances to require a challenger to identify an alternative transmitter site. Generally, there are a number of sites in a given community of license or broadcast area that would be appropriate for an antenna. The difficulty arises where a transmitter site is the only feasible location for an antenna in the community of license or broadcast area, the incumbent owns the site, and the incumbent represents that the site will not be available if it loses its license. Our experience leads us to conclude that these three factors do not converge frequently enough to justify a presumption which we now believe facilitates abuse of our license renewal process. Under these circumstances, a competing applicant must state on the application that it does not have reasonable assurance that the site will be available, in which case the staff will designate site availability as an issue in the comparative hearing. The ALJ will then resolve the issue based upon the evidence presented.[80]

68. Moreover, our experience has demonstrated, consistent with the comments, that the presumption is simply unrealistic. For example, if a transmitter is located on valuable real estate, the lessor or incumbent could have the *bona fide* intention of leasing or selling it to developers for any number of non-broadcast uses. It disserves the public to permit a challenger to assume the availability of a site and, in the process, avoid subjecting its own engineering proposal to comparative evaluation when, in fact, the site may not be available. This could leave a prevailing challenger without a site, resulting in interruption of service to the public. Experience has also demonstrated that the presumption operates unfairly to neutralize an advantage in the comparative process that the incumbent has earned. Under the *Cameron* presumption, incumbents who found a site, built a transmitter, developed an engineering proposal geared to that site, and successfully transmitted from the site received no credit or advantage for this capability.

69. For these reasons, we will no longer apply the *Cameron* presumption. If a renewal challenger is unable to provide reasonable assurance of transmitter site availiabity this will be designated as an issue in the comparative hearing. While we recognize that an inquiry into site availability may require additional time and resources, we believe that this potential disadvantage is far outweighed by the benefits of eliminating the policy.

70. The *Cameron* policy change will become effective on June 28, 1989, subject to OMB approval. For the same reasons stated in paragraphs 61 - 62 above, the policy change will apply to all prospective competing applications and all applications pending before the Commission as of the effective date of this *Report and Order* that have not been designated for a hearing as of the effective date ("pre-designation applicants"). The policy will not apply to applications pending before the Commission that have been designated for a hearing as of the effective date ("post-designation applications"). All pre-designation applicants who have relied upon the availability of the incumbent's transmitter site in their application will have until July 28, 1989, 30 days from the effective date, subject to OMB approval, to amend their application to show reasonable assurance of site availability as required in Section VII of FCC Form 301 and, if necessary, to amend the engineering data submitted.

IV. CONCLUSION

71. The policy revisions set out in this *Report and Order* constitute a significant step toward our goal of eliminating the opportunities, incentives, and mechanisms for abuse of our comparative renewal process. By placing limitations as to time and amount on payments that can be made in exchange for withdrawing competing applications and petitions to deny, we are removing the profit incentive for filing these challenges. Competing applicants and petitioners can no longer file challenges to license renewals for the non-legitimate purpose of extorting a large money settlement. Removing this profit incentive should significantly discourage non *bona fide* challenges. By eliminating the *Cameron* doctrine, we are changing a policy we now believe facilitated the filing of non *bona fide* competing applications. Our new policy should help ensure that only fully qualified applicants with reasonable assurance of site availability can participate in a comparative hearing.

72. These reforms, along with our amendments to Form 301,[81] as well as our continued efforts to devise clearer, more meaningful comparative criteria,[82] should significantly advance our overall goal of providing for meaningful hearings among *bona fide* applicants, devoid of opportunities for abuse of our process.

PROCEDURAL MATTERS

73. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's Final Regulatory Flexibility Analysis is contained in Appendix C.

74. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981)).

PAPERWORK REDUCTION ACT STATEMENT

75. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

76. Authority for the rule changes adopted herein is contained in Section 4(i) and (j), and 301, 303, 308 and 309 of the Communications Act of 1934, as amended.

77. Accordingly, it is ORDERED that the policies and the amendments to the Commission's Rules and Regulations adopted herein, as set forth in Appendix B, attached hereto, shall become effective on June 28, 1989, subject to Office of Management and Budget approval.

78. IT IS FURTHER ORDERED THAT the portions of this proceeding related to the renewal expectancy factor and the comparative renewal criteria (Parts III, IV and V of the *Second Further Notice)* are held open pending further comment on these issues pursuant to a *Third Further Notice of Inquiry and Notice of Proposed Rule Making* in this proceeding.

79. IT IS FURTHER ORDERED THAT the part of this proceeding related to amendments to FCC Form 301 (paragraphs 25-29 of the *Second Further Notice),* the policies related thereto, and the comments and reply comments received in response thereto are incorporated into General Docket No. 88-328 for resolution.

80. IT IS FURTHER ORDERED THAT, except as specified in Paragraphs 78 - 79, this proceeding is TERMINATED.

81. For further information on this proceeding, contact William H. Johnson, Mass Media Bureau, (202) 632-6460 or Marilyn Mohrman-Gillis, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

1. Action For Children's Television; Media Access Project; and Henry Geller and Donna Lampert

2. American Women in Radio and Television

3. Association of Independent Television Stations, Inc.

4. Barnstable Broadcasting Affiliates

5. Capitol Broadcasting Corporation; Garamella Broadcasting Company; Goltrin Acquisition Partnership; Infinity Broadcasting Corporation; Ralph C. Wilson Industries, Inc.; Shamrock Broadcasting, Inc.; South Fork Broadcasting Corp.; and WAHR, Inc.

6. CBS Inc.

7. Cox Enterprises, Inc.; and Diversified Communications

8. Fuller-Jeffrey Broadcast Companies

9. Great American Television and Radio Company, Inc.

10. Greater Media, Inc.

11. Leibowitz & Spencer; Florida Association of Broadcasters; Georgia Association of Broadcasters Inc.; Missouri Broadcasters Association; Nebraska Broadcasters Association; New York State Broadcasters Association, Inc.; Southwest Florida Broadcasters Association; South Florida Radio Broadcasters Association; Fort Myers Broadcasting Company; Greater Pacific Radio Exchange, Inc.; Guy Gannett Publishing Co.; Highlands Media Company, Inc.; John H. Phipps, Inc.; Radio WADO, Inc.; Southern Broadcast Corporation of Sarasota; S.R. Associates, Inc.; Sunshine Wireless Co., Inc.; and TK Communications, Inc.

12. Metroplex Communications, Inc.

13. Midwest Television, Inc.; and The Providence Journal Company

14. National Association of Broadcasters

15. National Broadcasting Company, Inc.

16. National Hispanic Media Coalition

17. Office of Communication of the United Church of Christ; National Association for Better Broadcasting; Telecommunications Research and Action Center; Black Citizens for a Fair Media; Chinese for Affirmative Action; League of United Latin American Citizens; and NOW Legal Defense and Education Fund

18. Orr & Earles Broadcasting, Inc.

19. Peper, Martin, Jensen, Maichel and Hetlage

20. Post-Newsweek Stations, Inc.

21. RKO General, Inc.

22. Southeast Broadcasting Limited Partnership; and Garden State Broadcasting Limited Partnership

23. Television Operators Caucus, Inc.

24. United States Catholic Conference

25. Univision Station Group, Inc.

26. Westinghouse Broadcasting Company, Inc.

27. WWOR-TV, Inc.

LIST OF REPLY COMMENTERS

1. A.H. Belo Corporation

2. Capitol Broadcasting Corporation; Garamella Broadcasting Company; Goltrin Acquisition Partnership; Infinity Broadcasting Corporation; Ralph C. Wilson Industries, Inc.; Shamrock Broadcasting, Inc.; South Fork Broadcasting Corp.; and WAHR, Inc.

3. Capital Cities/ABC, Inc.

4. Leibowitz & Spencer; Florida Association of Broadcasters; Georgia Association of Broadcasters Inc.; Missouri Broadcasters Association; Nebraska Broadcasters Association; Southwest Florida Broadcasters Association; South Florida Radio Broadcasters Association; Fort Myers Broadcasting Company; Greater Pacific Radio Exchange, Inc.; Guy Gannett Publishing Co.; Highlands Media Company, Inc.; John H. Phipps, Inc.; Radio WADO, Inc.; Southern Broadcast Corporation of Sarasota; S.R. Associates, Inc.; Sunshine Wireless Co., Inc.; and TK Communications, Inc.

5. Metroplex Communications, Inc.

6. National Association of Broadcasters

7. National Black Media Coalition

8. New York State Broadcasters Association, Inc.

9. Office of Communication of the United Church of Christ; National Association for Better Broadcasting; Telecommunications Research and Action Center; Black Citizens for a Fair Media; Chinese for Affirmative Action; League of United Latin American Citizens; and NOW Legal Defense and Education Fund

10. Southeast Florida Broadcasting Limited Partnership; and Garden State Broadcasting Limited Partnership

APPENDIX B

1. Section 73.3523 is added to 47 C.F.R. Part 73 to read as follows:

Section 73.3523. Dismissal of applications in renewal proceedings.

(a) Any applicant for a construction permit, that has filed an application that is mutually exclusive with an application for the renewal of a license of an AM, FM or television station (hereinafter "competing applicant"), and seeks to dismiss or withdraw its application and thereby remove a conflict between applications pending before the Commission, must obtain the approval of the Commission.

(b) If a competing applicant seeks to dismiss or withdraw its application prior to the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal of its application, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in exchange for dismissing or withdrawing its application;

(2) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(3) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining competing applicant and the renewal applicant must submit an affidavit setting forth:

(4) A certification that neither the applicant nor its principals has paid or will pay any money or other consideration in exchange for the dismissal or withdrawal of the application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of the application.

(c) If a competing applicant seeks to dismiss or withdraw its application after the Initial Decision stage of the hearing on its application, it must submit to the Commission a request for approval of the dismissal or withdrawal of its application, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the applicant nor its principals has received or will receive any money or other consideration in excess of the legitimate and prudent expenses of the applicant;

(2) The exact nature and amount of any consideration paid or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement;

(4) A statement that its application was not filed for the purpose of reaching or carrying out an agreement with any other applicant regarding the dismissal or withdrawal of its application; and

(5) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

In addition, within 5 days of the applicant's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(6) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the withdrawing applicant in exchange for the dismissal or withdrawal of the application; and

(7) The terms of any oral agreement relating the dismissal or withdrawal of the application.

(d) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) An application shall be deemed to be pending before the Commission from the time an application is filed with Commission until an order of the Commission granting or denying the application is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, and prosecuting its application.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

2. Section 73.3524 is added to 47 C.F.R. Part 73 to read as follows:

Section 73.3524. Dismissal of petitions to deny in renewal proceedings.

(a) Whenever a petition to deny has been filed against any application for the renewal of a license for an AM, FM, or television station, or against a construction permit application that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny, either unilaterally or in exchange for financial consideration, the petitioner must file with the Commission a request for approval of the dismissal or withdrawal, a copy of any written agreement related to the dismissal or withdrawal, and an affidavit setting forth:

(1) A certification that neither the petitioner nor its principals has received or will receive any money or other consideration in excess of legitimate and prudent expenses in exchange for the dismissal or withdrawal of the petition to deny;

(2) The exact nature and amount of any consideration received or promised;

(3) An itemized accounting of the expenses for which it seeks reimbursement; and

(4) The terms of any oral agreement related to the dismissal or withdrawal of the petition to deny.

In addition, within 5 days of petitioner's request for approval, each remaining party to any written or oral agreement must submit an affidavit setting forth:

(5) A certification that neither the applicant nor its principals has paid or will pay money or other consideration in excess of the legitimate and prudent expenses of the petitioner in exchange for dismissing or withdrawing the petition to deny; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of the petition to deny.

(b) Citizens' agreements. Whenever a petition to deny has been filed against any application for the renewal of a license for an AM, FM, or television station, or against a construction permit application that is mutually exclusive with a renewal application, and the petitioner seeks to dismiss or withdraw the petition to deny in exchange for non-financial consideration (*e.g.*, programming, ascertainment or employment initiatives), this is referred to as a citizens' agreement. The parties to the agreement must file with the Commission a joint request for approval of the citizens' agreement, a copy of any written agreement, and an affidavit executed by each party setting forth:

(1) Certification that neither the petitioner, nor any person or organization related to the petitioner, has received or will receive any money or other consideration in connection with the citizens' agreement other than legitimate and prudent expenses incurred in prosecuting the petition to deny;

(2) Certification that neither the petitioner, nor any person or organization related to petitioner is or will be involved in carrying out, for a fee, any programming, ascertainment, employment or other non-financial initiative referred to in the citizens' agreement; and

(3) The terms of any oral agreement.

(c) For the purposes of this section:

(1) Affidavits filed pursuant to this section shall be executed by the applicant, permittee or licensee, if an individual; a partner having personal knowledge of the facts, if a partnership; or an officer having personal knowledge of the facts, if a corporation or association.

(2) A petition shall be deemed to be pending before the Commission from the time a petition is filed with Commission until an order of the Commission granting or denying the petition is no longer subject to reconsideration by the Commission or to review by any court.

(3) "Legitimate and prudent expenses" are those expenses reasonably incurred by a petitioner in preparing, filing, and prosecuting its petition for which reimbursement is being sought.

(4) "Other consideration" consists of financial concessions, including but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

3. Section 73.3525 is amended by revising the first sentence of paragraph (a) as follows:

Section 73.3525. Agreements for removing application conflicts.

(a) Except as provided in Section 73.3523 regarding dismissal of applications in comparative renewal proceedings, * * *

* * * * *

4. Section 73.3568 is amended by revising the first sentence of paragraph (a) and the first sentence of paragraph (c) as follows:

Section 73.3568. Dismissal of applications.

(a) Subject to the provisions of Section 73.3523 (Dismissal of applications in renewal proceedings) and Section 73.3525 (Agreements for removing application conflicts), any application may, upon request of the applicant be dismissed without prejudice as a matter of right prior to the designation of such application for hearing.

* * * * *

(c) Subject to the provisions of Section 73.3523 (Dismissal of applications in renewal proceedings) and Section 73.3525 (Agreements for removing application conflicts), requests to dismiss an application without prejudice after it has been designated for hearing will be considered only upon written petition properly served upon all parties of record.

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APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS

I. Need and Purpose of this Action:

The goal of this action is to eliminate the opportunities, incentives and mechanisms for abusing our license renewal process.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No comments were received which related to the Initial Regulatory Flexibility Analysis.

III. Significant Alternatives Considered and Rejected:

We hereby take a number of actions to reform the comparative renewal process. First, we are banning all payments to non-incumbent competing applicants made in exchange for withdrawing competing applications prior to the Initial Decision stage of a hearing, and limiting payments made thereafter to legitimate and prudent expenses. The record demonstrates that there is the clear potential for abuse of our process, and that we need to reduce the potential for abuse to further the public interest. We find that banning all pre-Initial Decision payments and restricting all post-Initial Decision payments to legitimate and prudent expenses is the most effective way to curb abusive competing applications without discouraging *bona fide* applications. We rejected the option of banning payments completely because we believed this would discourage legitimate applicants, and would not permit efficient settlements of applications. We rejected the option of permitting recovery of legitimate and prudent expenses at any time during the process to help ensure that only serious applicants enter the process. By limiting recovery of legitimate and prudent expenses to the post-Initial Decision stage, we hope to weed out weak applicants who could previously file no-risk, no-cost applications, knowing they could generally recover fees and costs at any time. Finally, we rejected the option of imposing no limits because this does not address the serious problem of abuse of our process.

Second, we are limiting payments that can be made in exchange for dismissing petitions to deny to legitimate and prudent expenses. We believe that restricting payments to legitimate and prudent expenses will eliminate the primary incentive for filing abusive petitions without impeding their use to further the public interest. In so doing, we rejected the option of banning all payments. We were concerned that banning the recovery of legitimate and prudent expenses may discourage persons from filing petitions to deny, and thereby undermine the important monitoring role such petitions play in our regulatory scheme. We also rejected the option of imposing no limits on payments because that option did not address the serious problem of abuse of our process.

Third, we are eliminating the *Cameron* doctrine, a policy which permitted competing applicants to assume that an incumbent's transmitter site would be available in the event the challenger prevailed. In so doing, we rejected options of retaining the *Cameron* doctrine or modifying its application. We rejected these options because we found that the *Cameron* doctrine (1) facilitates the filing of non *bona fide* applications; (2) is unrealistic and may disserve the public interest; and (3) operates unfairly to neutralize an advantage in the comparative hearing that an incumbent has earned. We found further that requiring a competing applicant to demonstrate reasonable assurance of site availability is generally not unreasonable.

FOOTNOTES

[1] *Notice of Inquiry in BC Docket No. 81-742*, 88 FCC 2d 120 (1981) ("*Notice*"); *see also Further Notice of Inquiry in BC Docket No. 81-742*, 47 Fed. Reg. 4617 (released Oct. 1, 1982) ("*Further Notice*").

[2] *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81-742*, 3 FCC Rcd 5179 (released Aug. 16, 1988) ("*Second Further Notice*").

[3] The term "abuse of process" can be generally defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule. Our use of this term here is, in general, confined to abuse of process arising from the filing of competing applications and petitions to deny.

[4] *Report and Order in Gen. Docket No. 88-328 (Revision of Application for Construction Permit for Commercial Broadcast Station),* FCC 89-110,- FCC Rcd - (released April 20, 1989) ("*Form 301 Report and Order*").

[5] *Third Further Notice of Inquiry and Notice of Proposed Rule making in BC Docket No. 81-742,* FCC No. 89-109, - FCC Rcd (adopted March 30, 1989) ("*Third Further - Notice*").

[6] *See Notice of Proposed Rule Making in MM Docket No. 87-314,* 2 FCC Rcd 5563 (1987).

[7] We recognized that the abuse issues raised in MM Docket No. 87-314 also relate extensively to matters outside the renewal process and stated that we would act on such issues at a later date. *See Second Further Notice,* 3 FCC Rcd at 5180 n. 15.

[8] *See* 47 C.F.R. §73.3516(e) (1987).

[9] *See Citizens Communications Center v. FCC,* 447 F.2d 1201, 1211 (D.C. Cir. 1971) ("*Citizens I*") *clarified,* 463 F.2d 822 (D.C. Cir. 1972) ("*Citizens II*").

[10] 47 U.S.C. §311(d)(1).

[11] 47 U.S.C. §311(d)(3).

[12] 47 U.S.C. §309(d).

[13] *See* 47 C.F.R. §73.3584. A petition to deny may also be filed against applications for transfers and assignments of construction permits or station licenses. Abuses in relation to such petitions are beyond the scope of this proceeding and will be dealt with in our general abuse proceeding (MM Docket No. 87-314).

[14] *Faulkner Radio, Inc. v. FCC,* 557 F.2d 866, 875 (D.C. Cir. 1977).

[15] *See Agreements Between Broadcast Licensees and the Public,* 57 FCC 2d 42, 54 (1975).

[16] From 1963 until 1982, pursuant to what became known as the NBC Doctrine, we would not ordinarily approve settlements of competing applications in the renewal context except (1) in unique and compelling circumstances, and (2) for no more than the legitimate and prudent expenses of the withdrawing party. *See National Broadcasting Co., Inc.,* 25 RR 67 (1963). In 1981, Congress amended Section 311(d) of the Act by adding the language set out in paragraph 8 *supra* governing Commission approval of settlements of competing applications. In *Western Connecticut Broadcasting Co.,* 88 FCC 2d 1492, 1497 (1982), we found that there was no further need for our NBC Doctrine as a result of the amendment to Section 311(d). *See* ¶ 38, *infra,* for a discussion of this change in policy.

[17] *See Revision of Application for Construction Permit for Commercial Broadcast Station,* 50 RR 2d 381 (1981).

[18] *See Second Further Notice* at ¶¶ 14-39.

[19] *See* Comments of Action for Children's Television, filed jointly with Media Access Project and Henry Geller and Donna Lampert ("ACT *et al.*"); Capital Broadcasting Corporation *et al.* ("CBC *et al.*"); CBS, Inc.; Cox Enterprises, Inc. and Diversified Communications ("Cox"); Fuller-Jeffrey Broadcast Companies ("Fuller-Jeffrey"); Great American Television and Radio Company, Inc. ("Great American"); Leibowitz & Spencer, *et al.*; Metroplex Communications, Inc. ("Metroplex"); Midwest Television, Inc. and The Providence Journal Company ("Midwest"); National Association of Broadcasters ("NAB"); Office of Communication of the United Church of Christ filed jointly with National Association for Better Broadcasting, Telecommunications Research and Action Center, Black Citizens for a Fair Media, Chinese for Affirmative Action, League of United Latin American Citizens, and NOW Legal Defense and Education Fund ("UCC *et al.*"); Peper, Martin, Jensen, Maichel and Hetlage ("Peper Martin"); Post-Newsweek Stations, Inc. ("Post-Newsweek"); Television Operators Caucus, Inc. ("TOC"); Univision Station Group, Inc. ("Univision"); Westinghouse Broadcasting Company, Inc. ("Group W"); and WWOR-TV, Inc. *See* Reply Comments of A.H. Belo Corp. ("Belo") and Capital Cities/ABC Inc. *See* Appendix A for a list of all commenters and reply commenters in BC Docket 81-742. In addition, eight comments and reply comments were filed in MM Docket 87-314 that have also been reviewed in reaching our decision herein.

[20] *See* Comments of S.E. Broadcasting at 8-20.

[21] *See* Comments of NAB at 22, CBC *et al.* at 10, CBS at 14-22, ACT *et al.* at 15, UCC *et al.* at 44, Liebowitz & Spencer at 8, Cox at 6 and Great American at 8 n.2. *See* Reply Comments of Capital Cities/ABC at 4.

[22] *See* Comments of S.E. Broadcasting at 17, AWRT at 4, and NHMC at 5.

[23] *See* n. 19 *supra.*

[24] Great American, Midwest, Peper Martin, and Univision.

[25] While the *UCC et al.* support the "legitimate and prudent expense" standard, it asserts that the Commission's definition of abuse as extracting financial or *other consideration* is too broad. The *UCC et al.* advocate confining the definition of abuse to "the extraction of financial concessions in the form of money, the transfer of assets, or the provision of any item of tangible pecuniary benefit" to the challenger. Comments of *UCC et al.* at 36. They argue that extracting *non-financial* concessions, such as programming or employment agreements, is the legitimate object of dialogue between citizens and licensees and should be permitted. *Id.* at 35-36.

[26] *See, e.g.,* Comments of CBS at 10-11, UCC *et al.* at 45.

[27] *See, e.g.,* Comments of CBS at 10-11; Great American at 8.

[28] *See* List of commenters, App. A.

[29] Belo, Cox, Fuller-Jeffrey, Post-Newsweek, and Group W.

[30] *See* Comments of NAB at 19-20, Leibowitz & Spencer at 5-9, and Group W at 13-14.

[31] *See* Comments of CBC *et al.* at 7-9.

[32] *See* Comments of Group W at 14.

[33] *See* Comments of UCC *et al.* at 37.

[34] *See* Comments of ACT *et al.* at 15.

[35] *See* Comments of CBC *et al.,* Cox, Fuller-Jeffrey, Great American, Leibowitz & Spencer, *et al.,* Midwest, NAB, UCC *et al.,* Peper Martin, Post-Newsweek, TOC, Univision, and Group W.

[36] *See* ¶¶ 16-18 *supra.*

[37] Comments of ACT *et al.* at 16, and Reply Comments of Capital Cities/ABC at 8-10 and NBMC at 3-4.

[38] *See* Comments of AWRT at 3. CBS, which supports limiting payments to legitimate and prudent expenses for settlements of competing applications, states no position with regard to petitions to deny.

[39] CBC *et al.,* UCC *et al.,* ACT *et al.,* NHMC and NBMC (in a separate reply).

[40] Comments of UCC *et al.* at 38-39.

[41] *Id.* at 39-40.

[42] Comments of CBC *et al.* at 12. CBC cites as an example of a payment that should be allowed, the payment by a broadcaster to a college to establish a minority student internship program. *Id.* at 13.

[43] *See, e.g., United Broadcasting Co. of Eastern Maryland, Inc.,* FCC 85R-83 (released October 10, 1985) ($400,000 settlement paid to opposing applicant in an FM renewal); *United Broadcasting Company of New York, Inc.,* FCC 85R-81 (released October 7, 1985) ($240,000 paid to competing applicant in settlement of

AM renewal); and *Western Broadcasting, Inc.*, FCC 86M-3434 (released November 24, 1986) ($75,000 for dismissal and 198,000 for related civil litigation expenses paid to competing applicant).

[44] Prior to modifications in our *Form 301 Report and Order*, adopted concurrent with this rule making, competing applicants were permitted to file applications without identifying in the application (1) a financial plan or sources of funding, (2) equity owners in the applicant who are sometimes the real parties behind the application, or (3) their plans for ownership integration. *See* n. 4 *supra*.

[45] *See, e.g.*, Comments of NAB at 16, Comments of CBS at 5-6, Comments of CBC *et. al.* at 9, Comments of UCC *et. al.* at 44, Reply Comments of Belo at 2.

[46] According to Post-Newsweek, the cost to its Miami and Jacksonville stations and their personnel of fighting renewal challenges while trying to operate effectively to serve the public was enormous. They noted that the staff was required to review 14,000 pages of records to compile information for one interrogatory alone out of 299. *See* Post-Newsweek Comments at 15-16 n.3. Metroplex reported that defending the WHYI renewal challenge has required hundreds of hours of station and management time to review thousands of documents, respond to interrogatories and depositions, prepare written hearing testimony, oversee work of counsel and appear at the hearings. *See* Comments of Metroplex at 3.

[47] *See, e.g.*, Comments of Post-Newsweek at 16, Metroplex at 3, NAB at 11, CBC *et al.* at 5-6, and UCC *et al.* at 44.

[48] *See, e.g.*, Comments of CBS at 5.

[49] Comments of S.E. Broadcasting at 9.

[50] *See* Comments of Metroplex at 3.

[51] *See* Comments of Great American at 4-7.

[52] We note that NAB attempted to compile statistical evidence of abuse but says it was unsuccessful because of, *inter alia*, the following factors: 1) its inability to collect statistically significant data because of a limited population of licensees that have faced license renewal since 1981; (2) confidentiality clauses prohibiting licensees from disclosing terms of settlement agreements; and (3) licensees' fear of retaliation for raising allegations of misconduct or extortion. Comments of NAB at 9-10.

[53] *See* Comments of NAB at 14-15 and App. A to NAB Comments, Att 2.

[54] *See, e.g.*, "FCC's License Sweepstakes: How to Succeed in Radio Without Really Buying," *Legal Times*, Vol. XI, No. 14, August 29, 1988; "A License to Extract Ransom?" *Barwood Review*, April 5, 1989 at 4; "A Call to Arms Over Comparative Renewal," *Broadcasting*, May 16, 1988 at 29; "Comparative Renewal: The Biggest Gamble on the Air?" *Broadcasting*, Aug 24, 1987 at 27-33.

[55] The Initial Decision is the determination by an Administrative Law Judge, after a full hearing on the merits, as to the applicant that should be awarded the broadcast license.

[56] Typically parties to a hearing are required to file motions to enlarge, change or delete issues, attend pre-hearing conferences, engage in discovery (generally by deposition) and file discovery-related motions, submit documentary and oral evidence at a hearing, and file proposed findings of fact and conclusions of law.

[57] If the Initial Decision favors the challenger, there is less concern about potential abuse of process. An incumbent licensee who seeks to renew its license is not in this category of potential abusers. Thus, as discussed in paragraph 33 *infra*, a challenger is free to pay an incumbent either to sell the station or to dismiss its renewal application at any time without monetary limitation.

[58] We note that the Supreme Court has stated that where the statutory provisions are clear and unequivocal on their face, there is no need to look beyond the words of the statute. *TVA v. Hill*, 437 U.S. 153, 148 & n. 29 (1978); *United States v. Oregon*, 366 U.S. 634, 648 (1961).

[59] H.R. Rep. No. 97-208, 97th Cong., 1st Sess 898 (1981).

[60] Sections 4(i) and 303(r) of the Communications Act accord the Commission considerable flexibility to adopt rules and regulations as may be necessary to carry out the provisions of the Act.

[61] *Cf. FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

[62] Our intepretation of the statutory language is not inconsistent with Congressman Wirth's floor statement that "the intent of the conferees was not, in any way, to prevent an incumbent licensee from making a payment in excess of expenses to a party challenging that licensee as a means of settling that challenge" except in those cases where the applicant was not *bona fide*. *See* 127 Cong. Rec. 18956 (1981) (comments of Congressman Wirth). Congressman Wirth's statement should not be liberally construed as compelling the Commission to approve settlement payments that exceed expenses. Rather, his statement indicates Congress' intent to remove the constraint on our authority in this area that previously existed under Section 311 and thus afford the Commission flexibility to allow reimbursement in excess of legitimate and prudent expenses where such payments are consistent with the public interest. Thus, as with the statutory language itself, his statement is consistent with giving the Commission broad discretion bounded only by the public interest standard in Section 311(d)(3)(A) and the express limitation in Section 311(d)(3)(B) directed at frivolous applications.

[63] Prior to the 1982 amendment, Section 311 prohibited the Commission from approving settlement agreements among competing applicants for new licenses that provided for payments in excess of legitimate and prudent expenses.

[64] Pub. L. No. 86-752, §5(a), 74 Stat. 892 (1960), *codified* at 47 U.S.C. §311(c) (1960).

[65] H.R. Rep. No. 97-765, 97th Cong., 2nd Sess. 49 (1982) (hereinafter "Section 311(c) Conference Report").

[66] 88 FCC 2d 1492, 1497 (1982).

[67] *See* 47 U.S.C. §309 (d); 47 C.F.R. §73.3584. Persons may also file, among other things, petitions to deny applications for construction permits, transfers, and assignments of licenses. Our policies articulated herein apply only to petitions filed against license renewal applications. *See Second Further Notice*, 3 FCC Rcd at 5180 n. 15. Abuse relating to petitions filed in other contexts will be addressed in our general proceeding on abuse of process (MM Docket No. 87-314). *See* n. 7 *supra*.

[68] *Office of Communication of the United Church of Christ v. FCC*, 779 F.2d 702, 710 (D.C. Cir. 1985).

[69] *Id.* at 708. *See, e.g.*, Comments of UCC at 30 and Reply Comments of Capital Cities/ABC at 8.

[70] 57 FCC 2d 42 (1975) *("Citizens' Agreements")*. With regard to this enforcement issue, the *Second Further Notice* specifically excluded from consideration our "policies set forth in *Agreements* regarding EEO or other non-programming aspects of station operation." 3 FCC Rcd at 5185 n. 51.

[71] Our presumption against agreements to pay *petitioner* for services rendered relates only to those citizens' agreements negotiated in the license renewal context in exchange for dismissing petitions to deny. We will address potential abuse in citizens' agreements in other contexts in our general abuse proceeding, MM Docket No. 87-314. *See* n. 7 *supra*.

[72] With respect to issues of licensee control that have arisen in this context on occasion, we believe that the Commission's general policies proscribing improper delegations of control are sufficient to ensure against licensee abdication through agreement with outside interest groups. *See generally Trustees of the University of Pennsylvania (WXPN-FM),* 69 FCC 2d 1394 (1978); *WCHS-AM-TV Corp.,* 8 FCC 2d 608 (1967).

[73] *See, e.g., Booth American Company,* 58 FCC 2d 553, 554 (1976); *Agreements Between Broadcast Licensees and the Public,* 57 FCC 2d at 53.

[74] All applications and petitions to deny filed in license renewal proceedings will be deemed pending before the Commission from the time an application or petition is filed with the Commission until an order of the Commission granting or denying the application or petition is no longer subject to reconsideration by the Commission or review by any court.

[75] "Other consideration," as used herein, constitutes any *non-financial* concessions, including but not limited to programming, ascertainment or employment concessions.

[76] We do not consider the inability to profit from a settlement of a competing application or petition to deny an adverse effect of imposing our new policies and rules on these applicants. As we explained above, filing a competing application or petition to deny with the intention or expectation of profiting from that challenge is a non-legitimate use of the Commission's processes.

[77] *See, e.g., Lorenzo W. Milam,* 4 FCC 2d 610 (1966), *aff'd sub nom. Christian Fundamental Church v. FCC,* 12 RR 2d 2116 (D.C. Cir. 1968). *See* FCC Form 301, Sec. VII.

[78] 71 FCC 2d 460, 467 (1979).

[79] *See* Comments of CBC *et al.,* Cox, Great American, Liebowitz & Spencer, Midwest, NAB, Post-Newsweek, and TOC.

[80] If an existing transmitter site is the only feasible site, the site is owned or controlled by the incumbent, and the incumbent claims it is unavailable, the Commission will not permit the incumbent's claim alone to preclude consideration of the challenging applicant based on the site issue. Should a competing applicant prevail under these circumstances and the unique site remain unavailable, the Commission will consider waivers, as necessary, to accommodate the prevailing applicant.

[81] *See Form 301 Report and Order,* n. 4 *supra.*

[82] *See Third Further Notice of Proposed Rule Making,* n. 5 *supra.*

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

Concurring in part, dissenting in part

In Re: In the Matter of Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, and Other Participants in the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process (BC Docket No. 81-742).

I share my colleagues' goal of improving the comparative renewal process. I write separately, however, because I disagree with the dosage they prescribe to cure its ills.

First, I agree that we should attempt to prevent abuse of process by prohibiting payments to challengers in excess of their legitimate and prudent expenses. This change will discourage challengers from filing applications to obtain a windfall settlement. Banning excess payoffs will provide a deterrent to this abuse.

I cannot agree, however, with the majority's decision to ban reimbursement altogether before an Initial Decision. The majority's line drawing will build perverse incentives into the renewal process. Banning reimbursement in the early stages of the proceeding will provide little or no additional deterrence, because challengers can still be reimbursed after the Initial Decision.

Nor will it significantly reduce challengers' leverage over incumbents because, even after an Initial Decision, the incumbent potentially faces a long, tortuous road ahead--the Review Board, the Commission, and the Court of Appeals. Instead, this two-tier approach will discourage parties from reaching a voluntary, good faith agreement at an early stage, at minimal cost to themselves and the Commission, in exchange for reimbursement of expenses. We will thereby prevent applicants from settling their differences and ending a hearing that neither of them wants to pursue. Rather than encouraging these legitimate settlements, we may be causing parties who want to settle to endure a long, pointless hearing through to an Initial Decision.

Secondly, I also share my colleagues' concern that we weed out potential abuse in the petition to deny process. Nevertheless, we should not lose sight of the value of petitions to deny in exposing violations of our policies and in prodding licensees to improve their performance. Therefore, I cannot support policies so harsh as to discourage the filing of legitimate petitions.

I favor limiting payments to petitioners in most cases to their legitimate and prudent expenses. If, however, a petitioner agrees to provide services for the licensee as part of an agreement to withdraw the petition, I would not *presume* that the agreement--which of course the parties enter voluntarily--is invalid. Rather, the Commission should examine the agreements case by case, with no presumption either way, and approve those agreements that involve the performance of legitimate services, at a reasonable rate.[1]

Finally, in repealing the Cameron Doctrine, I am pleased the *Order* recognized that the incumbent may own or control a transmitter site which is the only reasonably feasible site in the licensee's service area. *Order* at n. 80. There may also be cases where the incumbent leases the unique site but extracts an exclusive agreement from the site owner to prevent access by a challenger. This would raise an abuse of process issue. *(See Broadcasting,* April 24, 1989, "Open Mike" letter of Vincent L. Hoffman). We cannot allow the incumbent, through these and other such means, to supplant the FCC as the licensor.

FOOTNOTE FOR STATEMENT

[1] For example, a licensee may have had difficulty in recruiting qualified minority applicants. If the licensee and the petitioner agree to have the petitioner assist in recruitment, if the petitioner is qualified to perform that role, and if the payment for petitioner's services is reasonable, then we could approve the settlement agreement.